

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

|                           |   |                         |                  |
|---------------------------|---|-------------------------|------------------|
| SADIE YVONNE COLEMAN,     | ) | CASE NO.                | C05-0788-RSL-MAT |
|                           | ) |                         | (CR01-309-RSL)   |
| Petitioner,               | ) |                         |                  |
|                           | ) |                         |                  |
| v.                        | ) | REPORT & RECOMMENDATION |                  |
|                           | ) |                         |                  |
| UNITED STATES OF AMERICA, | ) |                         |                  |
|                           | ) |                         |                  |
| Respondent.               | ) |                         |                  |

INTRODUCTION

Petitioner Sadie Yvonne Coleman was convicted in 2002 of numerous counts of identity theft and related offenses. She was sentenced to 120 months in prison. Petitioner has filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct her sentence. The government has filed an answer and petitioner has filed a response. Having considered the briefs filed in this matter and the balance of the record, the court recommends that petitioner's § 2255 motion be denied.

BACKGROUND

The Ninth Circuit Court of Appeals summarized the facts underlying petitioner's conviction, in part, as follows:

[Petitioner] used a wide variety of false forms, including blank marriage and birth certificates, blank W-2 forms, and notary stamps, to create fake identities. She repeatedly traveled from Washington to Oregon to take advantage of a rule that required only a middle initial (rather than a full middle name) to obtain official identification, in order to match fake identities with real victims. She set up a complex

01 two-bank scheme that allowed her and her co-conspirators to overdraw accounts by  
02 huge amounts by taking advantage of weaknesses in bank security at the chosen  
03 institutions. The district court permissibly concluded that these and [petitioner's]  
other methods showed a level of sophistication well beyond the usual identity theft.

04 *United States v. Coleman*, Unpublished Disposition, 83 Fed. Appx. 881 (9<sup>th</sup> Cir. 2003).

05 After a jury trial, petitioner was found guilty and sentenced to 120 months in prison. (Dkt.  
06 #165 in Case No. CR01-309). She appealed to the Ninth Circuit and that court affirmed her  
07 conviction. Petitioner filed a petition for a writ of *certiorari* with the Supreme Court and the  
08 Court denied the petition on April 19, 2004. *See Coleman v. United States*, 541 U.S. 1003  
09 (2004).

10 On April 18, 2005, petitioner signed the instant § 2255 motion and delivered it to prison  
11 authorities for mailing to the court. (Dkt. #1). On June 16, 2005, the government filed its answer,  
12 (Dkt. #9), along with a motion for leave to file an overlength response. (Dkt. #10). On July 1,  
13 2005, the court granted respondent's motion to file an overlength response. (Dkt. #13).  
14 Petitioner's § 2255 motion was noted for consideration on July 8, 2005.

15 On July 21, 2005, petitioner filed a motion for extension of time to file a response to the  
16 government's answer. (Dkt. #14). On July 25, 2005, the court granted petitioner an extension of  
17 time and on August 24, 2005, petitioner filed her response. (Dkt. #16). Petitioner's § 2255  
18 motion is now ready for review.

#### 19 GROUND FOR RELIEF

20 Petitioner raises the following grounds for relief in her § 2255 motion:

- 21 1. Trial Counsel was Ineffective.
- 22 2. Sentencing Court Violated Petitioner's Right to Trial by Jury.
- 23 3. Trial Court Improperly Denied a Hearing on Petitioner's Motion to Suppress.
- 24 4. Trial Court Improperly Instructed Jury on Multiple Conspiracy.
- 25 5. Trial Court Improperly Restricted Cross Examination of Tricia Ireland.

26 (Dkt. #1 at 5-8).

01 DISCUSSION

02 1. Petitioner's claim that trial counsel was ineffective.

03 Claims of ineffectiveness of counsel are reviewed according to the standard announced in  
04 *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In order to prevail, petitioner must  
05 establish two elements. First, she must establish that counsel's performance was deficient, *i.e.*,  
06 that it fell below an "objective standard of reasonableness" under "prevailing professional norms."  
07 *Strickland*, 466 U.S. at 687-88 (1984). Second, she must establish that she was prejudiced by  
08 counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's  
09 unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466  
10 U.S. at 694.

11 Regarding the first prong of the *Strickland* test, there is a "strong presumption that  
12 counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*,  
13 466 U.S. at 689. Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential."  
14 *Id.* The test is not whether another lawyer, with the benefit of hindsight, would have acted  
15 differently, but whether "counsel made errors so serious that counsel was not functioning as the  
16 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 689.

17 In addition, the Supreme Court has stated that "a court need not determine whether  
18 counsel's performance was deficient before examining the prejudice suffered by the defendant as  
19 a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697. "The object of an ineffective  
20 assistance claim is not to grade counsel's performance. If it is easier to dispose of an ineffective  
21 assistance claim on the ground of lack of sufficient prejudice, which we expect will often be so,  
22 that course should be followed." *Id.*

23 Petitioner contends that her trial counsel, Walter Palmer, was ineffective in a variety of  
24 ways. First, petitioner maintains that her counsel never presented her with the government's offer  
25 for a plea bargain. The government, however, has attached exhibits to its answer that demonstrate  
26 that counsel did provide petitioner with information about the offer made by the prosecutor.

01 These exhibits include a letter to petitioner from her counsel which refers to the plea offer (Dkt.  
02 #9, Ex. 6), and a sworn declaration by petitioner's counsel that he discussed the offer with  
03 petitioner on several occasions. (*Id.*, Ex. 7). In his declaration, counsel states that after hearing  
04 the offer, petitioner concluded that it did not "give [her] anything," and she rejected it. ( *Id.*)  
05 Further, the government argues that even if she did not receive the information regarding the plea  
06 offer, petitioner suffered no prejudice because the sentence which she ultimately received was  
07 "lower than she was promised or could expect under the plea offer." (Dkt. #9 at 19).

08 In her response to the government's answer, petitioner reiterates that she did not receive  
09 the letter sent to her by counsel and she implies that it might have been misaddressed. (Dkt. #16  
10 at 12). Petitioner also denies that they ever discussed the offer. She contends that had she  
11 accepted the offer, her sentence would have been shorter than if she proceeded to trial because  
12 under the plea agreement, the court would have found that petitioner had caused less of a financial  
13 loss to the institutions she defrauded. (Dkt. #16 at 13-14).

14 The court first notes that there is no evidence that the letter sent by counsel to petitioner  
15 was misaddressed or was returned as undeliverable. The court also notes that the trial judge in  
16 this matter, the Honorable Barbara Jacobs Rothstein, commented favorably on counsel's  
17 reputation when Judge Rothstein denied a motion by petitioner to substitute counsel, which  
18 petitioner had based upon an alleged breakdown in communication. In denying the motion, Judge  
19 Rothstein stated: "[Counsel] has appeared before this court on many occasions, and the court is  
20 familiar with and respects his judgment regarding matters of trial strategy. . . . [Petitioner] has  
21 failed to give the court any reason to call this respect into question." (Case No. CR01-309L, Dkt.  
22 #94 at 3, n.2).

23 However, the court need not resolve whether petitioner actually received information  
24 regarding the plea offer because petitioner's claim of prejudice is speculative. She claims that her  
25 sentence would have been shorter because the amount of loss caused by her actions would have  
26 been less under the plea agreement than was eventually determined, after a jury trial, by the

01 sentencing court. But the only evidence of the plea agreement's contents – a letter dated  
02 December 19, 2001 from the prosecutor to petitioner's counsel – does not mention the amount  
03 of financial loss caused by petitioner. (Dkt. #9, Ex. 5). Petitioner's claim is thus based on  
04 petitioner's *prediction* of how the sentencing court would have viewed the conduct underlying her  
05 offenses, and is not supported by anything concrete in the record. Accordingly, because petitioner  
06 has not shown prejudice, she has not met her burden under *Strickland* and the first part of her  
07 ineffective assistance of counsel claim should be denied. *Strickland*, 466 U.S. at 697.

08 Second, petitioner contends that counsel was ineffective because he failed to move to  
09 suppress evidence of her criminal record at trial and that, by failing to do so, he effectively  
10 precluded her from testifying. Petitioner maintains that she refrained from testifying for fear that  
11 her prior convictions would be used to impeach her. Thus, petitioner's claim is premised on her  
12 theory that counsel could have succeeded in barring the use of petitioner's prior convictions to  
13 impeach her.

14 Respondent argues that this claim is frivolous because under the Federal Rules of  
15 Evidence, after a witness has testified, the witness may be impeached with evidence that she "has  
16 been convicted of a crime. . . if it involved dishonesty or false statement." Fed. R. Evid.  
17 609(a)(2).<sup>1</sup> Here, petitioner had two convictions which appear to have involved "dishonesty or  
18 false statement": unlawful issuance of a bank check and theft in the second degree. (Dkt. #9 at  
19 19-20, *citing* Presentence Report). These convictions thus would have been admissible under the  
20 Federal Rules of Evidence. Accordingly, moving to suppress the convictions would likely have  
21 been futile, and petitioner's counsel cannot be deemed to be ineffective for failing to file a futile  
22 motion.

23 Petitioner next claims that her counsel was ineffective because counsel allegedly "never  
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25 <sup>1</sup> In addition, "evidence that an accused has been convicted of [a felony] shall be admitted  
26 if the court determines that the probative value of admitting this evidence outweighs its prejudicial  
effect . . . ." Fed. R. Evid. 609(a)(1). If the conviction is more than ten years old, the court must  
conduct a balancing test to determine whether it is admissible. Fed. R. Evid. 609(b).

01 interviewed a single prosecution witness or defense witness . . . [and] failed to investigate what  
02 other defenses were available.” (Dkt. #1 at 4-5). While this accusation sounds grave, petitioner  
03 does not support the claim with any detail.<sup>2</sup> She does not, for example, identify the witnesses that  
04 counsel should have interviewed, nor does she describe what such an interview would have yielded  
05 in the way of exculpatory evidence. Similarly, petitioner does not specify the defenses that counsel  
06 allegedly failed to investigate. Thus, she does not show any prejudice resulting from counsel’s  
07 alleged inaction. The claim therefore must be denied.

08 Petitioner’s final claim of ineffectiveness is a cryptic one. She contends that counsel was  
09 ineffective for failing to “request video evidence from the government,” but she does not further  
10 describe this video evidence. (Dkt. #1 at 4). The government responds that the only video  
11 evidence of which it is aware is a videotape showing a co-conspirator buying merchandise with  
12 a fraudulent check, while petitioner is nearby. (Dkt. #9 at 21). This tape does not seem  
13 exculpatory to the court. Petitioner thus does not provide sufficient details to substantiate this  
14 claim. Accordingly, petitioner’s last claim of ineffective assistance of counsel should be denied.

15 2. Petitioner’s claim that sentencing court violated petitioner’s right to jury trial.

16 Petitioner next claims that her right to trial by jury was violated when the sentencing court  
17 enhanced her sentence after making certain findings pursuant to the federal sentencing guidelines,  
18 e.g., the amount of financial loss caused by petitioner’s criminal conduct. Petitioner’s claim  
19 appears to be based upon the Supreme Court’s decision in *United States v. Booker*, 125 S. Ct. 738  
20 (2005). However, the Ninth Circuit recently joined all the other circuit courts that have  
21 considered the question and held that “the rule announced by *Booker* does not . . . operate  
22 retroactively,” to cases, such as the instant one, that were final before *Booker* was decided.  
23 *United States v. Cruz*, \_\_\_F.3d\_\_\_, Case No. 03-35873 (9<sup>th</sup> Cir. September 16, 2005). Therefore,

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24  
25 <sup>2</sup> The court notes that petitioner raised this issue in her motion but does not address it in  
26 her response to the government’s answer. In fact, her response addresses only the first part of her  
claim of ineffective assistance of counsel and her second claim that the sentencing court violated  
her right to trial by jury. (Dkt. #16).

petitioner may not challenge her sentence based on *Booker*, and this claim should be denied.<sup>3</sup>

3. Petitioner's claim that the trial court improperly denied her motion to suppress.

4. Petitioner's claim that the trial court improperly instructed the jury.

5. Petitioner's claim that the trial court improperly restricted cross examination.

Petitioner's last three claims were also raised in her direct appeal. Claims will ordinarily not be entertained under § 2255 that have already been rejected on direct review. *See Reed v. Farley* 512 U.S. 339, 358 (1994). The Ninth Circuit has held that in such circumstances, the scope of proceedings on § 2255 motions is limited to determining whether a petitioner can show either manifest injustice or a change in the law. *Polizzi v. United States*, 550 F.2d 1133, 1135 (9<sup>th</sup> Cir. 1976), *citing Kaufman v. United States*, 394 U.S. 217, 226-27 & n.8 (1969).

This rule is the opposite of the rule governing habeas petitions brought by state prisoners under 28 U.S.C. § 2254. Under § 2254, state prisoners are *required* to first bring their claims in state court before federal review may proceed. The reason for this difference between federal and state habeas petitions has been articulated as follows: "In the federal prisoner context, upon full and fair appellate consideration of a constitutional claim, the federal prisoner receives *before* reaching the postconviction stage what the state prisoner does not receive until *after* exhausting that stage – plenary consideration of her federal legal claims by independent federal judges." James Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, § 41.7e, 1762 (4<sup>th</sup> ed. 2001).

Petitioner has not shown either manifest injustice nor a change in the law that would enable her to present claims in the instant § 2255 motion which were previously raised in her direct

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<sup>3</sup> Petitioner attempts to argue that her *Booker* claim is actually based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which was decided *before* petitioner's conviction became final, thus obviating the need for the court to apply *Booker* retroactively. (Dkt. #19, Attachment entitled "*Apprendi* Argument [sic]"). However, *Apprendi* dealt with a New Jersey statute and not the Federal Sentencing Guidelines under which petitioner was sentenced. In addition, the Ninth Circuit in *Cruz* also held that the rule in *Booker* was a "new rule," and not simply the application of prior rulings such as *Apprendi* to new facts. *Cruz* at 13356-57. Therefore, petitioner's argument that *Apprendi* applies to her case and invalidates her sentence should be rejected.

01 appeal. Accordingly, petitioner's last three claims should be denied.

02 CONCLUSION

03 For the foregoing reasons, petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside,  
04 or correct her sentence, lacks merit and should be denied. A proposed Order is attached.

05 DATED this 19th day of September, 2005.

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07 Mary Alice Theiler  
08 United States Magistrate Judge  
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